1844

SUPREME COURT OF THE UNITED STATES.

No. 177.

THE COVINGTON DRAW-BRIDGE COMP'Y, APP'T,

vs.

ALEXANDER O. SHEPHERD AND AL.

APPEAL FROM THE CIRCUIT COURT U. S. FOR THE DISTRICT OF INDIANA.

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Pleas of the circuit court of the United States for the seventh judicial circuit and district of Indiana, on the 20th day of November, in the year of our Lord one thousand eight hundred and fifty-four, that being the time fixed by law for the holding of said court, before the honorable Elisha M. Huntington, judge of said court, begun, continued, and holden at Indianapolis in said district.

ALEXANDER O. SHEPARD, SAMUEL McCLURE, JAMES DAVIDSON, SAMUEL PETERS, ELIJAH F. GILLAN, & GEORGE WILLARD.
vs.
THE COVINGTON DRAW BRIDGE Company.

Be it remembered, that heretofore, to wit, on the 12th day of August, in the year 1853, the plaintiffs, by Hannegan & Vorhees, came and filed in the clerk's office their certain declaration, in these words and figures, to wit:

In the circuit court of the United States for the district of Indiana.
November term, 1855.

STATE OF INDIANA, *ss:*

Alexander O. Shepard, Elijah F. Gillan, James Davidson, Samuel McClure, Samuel Peters, and George Willard, citizens of the State of Ohio, plaintiffs in this suit, complain of the "Covington Draw-Bridge Company," citizens of the State of Indiana, defendants in this suit, in a plea of trespass on the case.

For that whereas the Wabash river, in the State of Indiana, before and at the time of the committing of the grievances hereinafter mentioned, was and yet is a public highway, free to all the citizens of the United States to navigate thereon with boats, vessels, and other water craft, at pleasure, and to pass and repass on the same without any obstruction, hindrance, or molestation whatever; yet the said defendants well knowing the premises, afterwards, to wit, on the first day July, in the year of our Lord one thousand eight hundred and fifty-one, near to the town of Covington, at the county of Fountain, in the said State of Indiana, wrongfully and unjustly put and placed divers large quantities of rock and stone in the channel of said river, and wrongfully and unjustly kept and continued the same therein from thence by night and by day. And the said defendants then and there, with the said large quantities of rock and stone piers, and with certain large quantities of timber

placed in said river, constructed a bridge across said river at the place aforesaid, and then and there in said bridge constructed and built a certain draw for the purpose of permitting the passage of steamboats and other water craft up and down said river; and it then and there became the duty of the said defendants to keep and have said draw in said bridge up and raised upon the approach of any steamboats or other vessel navigating said river, in order that the same same might pass said bridge without being obstructed in their course; but the said defendants, well knowing but utterly disregarding their said duty, did not nor would keep and have said draw in said bridge up and raised upon the approach of steamboats or other vessels, by means and in consequence of which said neglect of duty and improper conduct on the part of said defendants, on the sixteenth day of May, in the year of our Lord one thousand eight hundred and fifty-three, at the place aforesaid, a certain steamboat called the "Cabinet," of the plaintiff, of great value, to wit, of the value of twenty thousand dollars, then well and completely manned with a good and sufficient crew, and with attentive and skilful pilots, there going and passing on along the said Wabash river, was necessarily and unavoidably driven upon and against said rocks and stone piers. And the said plaintiffs aver, that the steamboat Cabinet had, at the time of the grievance above mentioned, a very loud and shrill whistle attached to her, with which to give notice of her approach to any point, and that with said whistle the said boat commenced giving notice of her approach to said draw in said bridge, when said boat was three miles distant from said draw, and kept constantly with said whistle giving notice of her said approach, until almost immediately in collision with said rocks and stone piers supporting said draw. And said plaintiffs further aver, that notwithstanding all the notice which had been given by said boat of her approach to said draw, yet the said defendants unjustly and wrongfully continued said draw down, and did not raise the same to permit the passage of said boat, and compelled the said boat to run backwards up said river from said bridge and draw, and await the action of the said defendants in raising said draw. And the said plaintiffs aver, that in consequence of said boat being compelled by said defendants' neglect of duty to stop her course and run backwards from said bridge and draw, she was driven necessarily and unavoidably against said rocks and stone piers as aforesaid; by means and in consequence of said steamboat being so driven as aforesaid against said rocks and stone piers, the said boat was then and there greatly broken and shattered in her wheelhouse, shafts, engine, machinery, furniture, fixtures, and in the body and cabin of said boat. And the said plaintiffs aver that they were put to great trouble, and expended large sums of money, to wit, the sum of six thousand dollars, in getting the said boat repaired and made fit for use and service, and were then and for a long time thereafter, to wit, for the space of five months next en-

suing, deprived of the use and profit of said boat, and were put to great trouble, and expended large sums of money in subsisting, keeping, and paying the hands and crew belonging to said boat while she was thus undergoing repairs, to wit, the sum of one thousand dollars. And the said plaintiffs aver that the said boat, during the time she was thus disabled and being repaired, would have reasonably earned for the said plaintiffs the further sum of five thousand dollars, over and above the expenses of running the same, which last mentioned sum has been lost to the said plaintiffs by reason of the collision aforesaid, to wit, at the State of Indiana aforesaid; wherefore the plaintiffs say that they are damaged in the sum of three thousand dollars, and hence they sue.

HANNEGAN & VORHEES,
Atty's for Plff's.

And whereas also, before and at the time of the committing of the grievances hereinafter mentioned, the Wabash river, in the State of Indiana, and from thence hitherto has been and still is a common and public highway, free for all citizens of the United States, to go, pass, and repass with their water craft and boats at all times of the year, at their free will and pleasure; yet, the defendants, well knowing the premises, heretofore, to wit, at the county and State aforesaid, on the day and year aforesaid, wrongfully and unjustly caused to be put and placed divers large quantitis of rock and stone pier in said river, and wrongfully and unjustly erected a bridge of timbers, by means whereof the def'ts then and there blocked up the said river, the same being then and there a public highway as aforesaid, whereby the said plaintiffs, passing along in the said river with his certain other steamboat called the "Cabinet," of the value of $20,000, which he, the said pl'tff, was then navigating in the said river, loaded with freight and bound to ports below on said river, and to ports in the State of Ohio and other States, the said steamboat then being used by the pl'ff in the lawful trade of said river, transporting the produce of the country to said ports—the said boat then being well manned, and navigated with due and ordinary care—arrived at said bridge in her downward passage, loaded as aforesaid, and bound for the ports aforesaid; and the said pl'tff then and there with his said boat endeavored to keep the bridge so erected by the defendants across the said navigable highway as aforesaid; and the said boat, which the pl'tff was using due and ordinary care in the navigation of the same, was, by the currents and winds, and without the fault of the navigation of said boat, driven upon and against said bridge, and the said boat was then and there broken in her wheels, hull, body, and machinery, apparel, and furniture, and was damaged by reason thereof, in the sum of five thousand dollars; and the pl'tff necessarily expended in the repairs of said boat the sum of five thousand dollars; the said boat was then by said collision so crip-

pled and injured as to be unable to prosecute her said voyage, and the pl'tffs lost the value of the freight on board said boat, which amounted to a large sum, to wit, the sum of two thousand dollars, and the pl'ff was then and there put to great trouble and expense in the subsisting of the hands and officers of said boat during the time said boat was delayed in her voyage and undergoing repairs, which were for a long space of time, to wit, for the space of thirty days, and said expenses amounted to the sum of two thousand dollars; and the pl'ff was deprived of the use of said boat during the time aforesaid, to wit, the space of thirty days; and the reasonable use of said boat to the pl'tff during the said boat was so undergoing repairs, was three thousand dollars; and pl'tff says, he is injured by reason of the premises in the sum of ten thousand dollars.

HANNEGAN & VORHEES.

Comes the said defendant, and for a plea in this behalf, says that she is not guilty of the said supposed grievances and wrongs in the several counts of the declaration mentioned, in manner and form as said pl'tff has alleged above against her, and of this she puts herself upon the country, &c.

WILSON & McDONALD.

It is agreed by plaintiffs, that on the trial of the above cause, the defendant may give any and all matters of legal defence under the above general issue.

J. P. USHER,
For Pl'ff's.

On declaration was endorsed the following notice, to wit: The clerk of said court will issue process according to law.

HANNEGAN & VORHEES,
For Pl'tff.

And afterwards, to wit, at a circuit court begun, continued, and holden at Indianapolis, in said district of Indiana, on the 8th day of December, in the year 1853, before the Hon. E. M. Huntington, judge of said district, that being the 16th judicial day of said term, when this cause was continued until the next term of court.

And afterwards, to wit, at a circuit court begun, continued, and holden at the same place, and before the Hon. E. M. Huntington, judge of said district, of 16th day of May, in the year 1854, that being the 1st judicial day of said term, by consent of parties, depositions are ordered to be published, and day is given.

And afterwards, to wit, at a circuit court, begun, continued, and holden at Indianapolis, in the district aforesaid, before the same judge as aforesaid, on the 22d day of May, that being 7th judicial day of said term.

Come now the parties by counsel; and thereupon, issue being

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joined between the parties, come a jury to try the same, to wit: Benjamin P. Douglass, W. P. Woodyard, Lot Day, jr., John Simlar, G. Brecount, David Thatcher, S. S. Mickle, Thomas A. McFarlane, Hiram McMurray, G. G. Upton, James M. Sleeth, and A. C. Van Orman, twelve good and lawful men of the district of Indiana, who, empanelled, tried, and sworn well and truly to try the issue joined between the parties, and a true verdict give according to the evidence, after hearing a portion of the evidence, by agreement of parties and leave of the court, separate until to-morrow morning 9 o'clock.

And this cause now continued from day to day until the 25th day of May, in the year aforesaid, before same judge as aforesaid, that being the 10th judicial day of said term.

Come now the parties by counsel, and thereupon comes the jury aforesaid, who, after argument of counsel and receiving the charge of the court, and due deliberation had, after retiring to their room to deliberate, attended by a sworn bailiff, return into court the following verdict, to wit:

We, the jury, find the defendants guilty, and assess the damages to the sum of six thousand eighty-four dollars and ninety-three cents.

And thereupon the defendants move the court to set aside the verdict, and grant a new trial, on the following grounds:

1st. The verdict is contrary to the evidence.

2d. The verdict is contrary to law.

3d. The jury mistook the law as charged by the court.

4th. The court refused to give the several charges requested by defendants to the jury.

And day is given the parties, &c.

And afterwards, to wit, at a circuit court begun, continued, and holden at the same place, and before the same judge as aforesaid, on the 19th day of June, in the year 1854, that being the 53d judicial day of said term,

Come the parties; and the court not being sufficiently advised, give the parties further day to hear their decision; and this cause is continued until the next term of this court.

And afterwards, to wit, at a circuit court, begun, continued, and holden at the same place as aforesaid, before the same judge as aforesaid, on the 15th day of December, in the year aforesaid, that being the 23rd judicial day of said term.

Now come the parties, by their attorneys; and the court being sufficiently advised of the motion for a new trial herein, overruled said motion.

It is therefore considered that the plaintiffs do recover against the said defendant the said sum of six thousand and eighty-four dollars and ninety-three cents in damages, as by the jury assessed as aforesaid, and also his costs and charges laid out and expended, taxed at eight hundred forty-five dollars and seventy cents.

And whereas also, heretofore, to wit, at a term of the said circuit court of the United States for the circuit and district, holden before the honorable Elisha M. Huntington, district judge as aforesaid, on Monday, the nineteenth day of May, in the year of our Lord one thousand eight hundred and fifty-six, come the said defendants, by O. H. Smith, their connsel, and move the court for an appeal and writ of error to the Supreme Court of the United States from said judgment. And afterwards, to wit, on Tuesday, the second judicial day of said term, come the said defendants, by O. H. Smith, their attorney, and the court grant the motion for an appeal and writ of error to the Supreme Court of the United States, upon the judgment in this behalf rendered in this court against them in favor of said plaintiffs, for six thousand eighty-four dollars and ninety cents and costs, on the 15th day of December, in the year eighteen hundred and fifty-four; and thereupon the defendants filed their writ of error in these words:

UNITED STATES OF AMERICA.

The President of the United States of America, to the judges of the circuit court of the United States for the seventh circuit and district of Indiana.

Because in the record and proceedings, and also in the rendition of the judgment in the said circuit court for the district of Indiana, wherein Alexander O. Shepherd, James Davidson, Elijah F. Gillan, Samuel McClure, Samuel Peters, and George Willard are plaintiffs, and the Covington Draw-Bridge Company are defendants, a manifest error hath happened, to the great damage of the said Covington Draw-Bridge Company, as by their complaint appears; and we being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington city, on the first Monday in December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what in right and according to the law and custom of the United States should be done.

Witness Roger B. Taney, Chief Justice of the Supreme Court of the United States, this 19th day of May, in the year 1856, and of the independence of the United States the 79th.

In testimony whereof, I Horace Bassett, clerk of said circuit [SEAL.] court, have hereunto set my hand and affixed the seal of said court, on the said 19th day of May, A. D. 1856.

H. BASSETT, *Clerk.*

And thereupon the defendants also file their bond in these words, which is approved by the court.

Know all men by these presents, that we, Richard M. Nebeker and John Andemson, are held and firmly bound unto Alexander O. Shepherd, James Davidson, Elijah F. Gillan, Samuel McClure, Samuel Peters, and George Willard, in the penal sum of three hundred dollars, lawful money, and to the payment whereof well and truly to be made, we bind ourselves, and heirs, &c., firmly by these presents. Sealed with our seals, and dated this 19th day of May, 1856.

The condition of the above obligation is such, that whereas the Covington Draw-Bridge Company have prosecuted a writ of error to the Supreme Court of the United States, from the judgment of the circuit court of the United States for the district of Indiana, in a case therein in which the said Alexander O. Shepherd, James Davidson, Elijah F. Gillan, Samuel McClure, Samuel Peters, and George Willard are plaintiffs, and the said Covington Draw-Bridge Company are defendants.

Now should said Covington Draw-Bridge Company well and truly prosecute said writ of error, and pay and satisfy all costs that may be adjudged against them on said appeal, then the above obligation to be void, else to be and remain in force.

R. M. NEBEKER, [SEAL.]
JOHN ADDEMSON, [SEAL.]

Approved May 20th, 1856.

E. M. HUNTINGTON,
Judge.

And whereas, afterwards, to wit, on Wednesday, the 22d day of May, 1856, being the 3d judicial day of the term aforesaid of the court aforesaid, come the said defendants, by their said counsel, and file their citation in this behalf, with the service thereof, in these words:

"UNITED STATES OF AMERICA."

To Alexander O. Shepherd, James Davidson, Elijah F. Gillan, Samuel McClure, Samuel Peters, and George Willard.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December, 1856, next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the seventh circuit and district of Indiana, wherein the Covington Draw-Bridge Company are plaintiffs, and you are defendants in error, to shew cause, if any there be, why judgment in the said writ of error mentioned should not be corrected and reversed, and speedy justice should not be done to the parties in this behalf.

Witness Hon. Elisha M. Huntington, district judge of the United States for the district of Indiana, this 19th day of May, 1856.

E. M. HUNTINGTON.

The above citation duly served by copy on John P. Usher, esq., attorney for the above defendants in error, this 22d day of May, 1856.

JOHN L. ROBINSON,
Marshal.
By GEO. McCREAT,
Deputy.

UNITED STATES OF AMERICA,
District of Indiana, ss:

I, Horace Bassett, clerk of the circuit court of the United States for the district of Indiana, do hereby certify that the foregoing thirteen pages contain a true copy of the record and proceedings in the above cause, as the same remain of record in said court, and that said pages contain true copies of the writ of error, bond, citation, and service of the same in said case on appeal, as the same are on file in the clerk's office of said court.

Given from under my hand and the seal of said court, at Indian-
[SEAL.] apolis, in said district, this 9th day of June, A. D. 1856.

H. BASSETT,
Clerk Cir. C. U. States.

Transcript and certificate, $2 75, paid by appellants.

H. BASSETT,
Clerk.

SUPREME COURT UNITED STATES.

THE COVINGTON DRAW-BRIDGE COMPANY, appellants,
v.
ALEXANDER O. SHEPHERD, JAMES Davidson, Elijah F. Gillan, Samuel McClure, Samuel Peters, and George Willard, appellees.

And the said appellants, by their counsel, come and say that in the record and proceedings, and the rendition of the judgment in the within and foregoing case, manifest error has intervened in this—

First. The judgment of the circuit court was rendered in favor

of the appellees, when, by the law of the land, the judgment should have been rendered for the appellants.

2d. The circuit court had no jurisdiction of the cause. The averment of the citizenship of the appellees, as stated in the declaration, is not sufficient to give jurisdiction to the court.

3. The circuit court erred in overruling the motion for a new trial, as the court had no jurisdiction of the case—the averment of the citizenship of the appellants, being in the following words: "The Covington Draw-Bridge Company, a citizen of the State of Indiana," without any averment that they were incorporated by any State, or that they had their business office in the State of Indiana.

For which and other errors in the record the appellants pray that the judgment may be reversed, the suit dismissed, and they may be restored to all things they have lost thereby.

O. H. SMITH,
Att'y for Appellants.